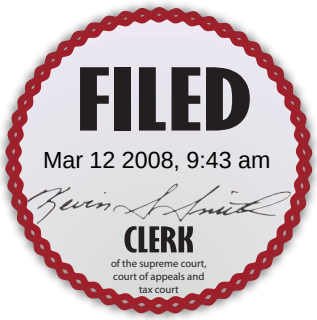

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IN THE
COURT OF APPEALS OF INDIANA

GEORGE BRANDON BOX,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A05-0706-CR-300
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-0408-MR-7

March 12, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

George Box was convicted after a jury trial of murder, a felony.[1] Box appeals the trial court's refusal to give a jury instruction on voluntary manslaughter[2] as a lesser-included offense of murder. We affirm.

FACTS AND PROCEDURAL HISTORY

Box was sitting on the porch of Joshua Williams' parents' house with Williams and several others from the neighborhood. Box and Williams knew each other from the neighborhood, had been in each other's homes, and had never had any problems with each other. At some point, Box left the porch stating he would return.

When he returned, Box started shooting at Williams. The first shot struck Williams in the knee. Box moved closer to the porch and continued to shoot, striking Williams three times in the chest and once in the head. Two shots lacerated William's carotid artery, and either would have been fatal. Box claimed Williams had a gun in his lap pointed in his direction and he believed Williams was going to shoot him. However, Box acknowledged Williams neither raised the gun nor moved it. No gun was found on Williams after the incident. Two witnesses testified Box said something about a "mother" or his "mama" before shooting Williams. (Tr. at 146-47, 217.) Another witness testified Box mumbled something about "money" after he stopped shooting. (*Id*. at 195-196.) Box testified no words were exchanged during the incident. After Box stopped shooting, he walked away from the house. Box later turned himself in to the police and admitted he had just shot someone.

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[1] Ind. Code § 35-42-1-1.
[2] Ind. Code § 35-42-1-3(a).

The trial court declined to give Box's orally requested jury instruction regarding the lesser-included offense of involuntary manslaughter. Box did not tender a written request for such instruction. The jury found Box guilty of murder.

DISCUSSION AND DECISION

Box waived his argument the jury should have been instructed on voluntary manslaughter because he did not tender a written instruction. Box requested the jury instruction orally and "[a]n oral request for a . . . jury instruction is not enough." *Ketcham v. State*, 780 N.E.2d 1171, 1177 (Ind. Ct. App. 2003). Failure to tender the jury instruction in writing waives the instruction claim on appeal. *Id*. "[T]he entitlement to included offenses instructions, in an appropriate case, is not a fundamental right but rather is one that must be claimed and the claim preserved, in accordance with established rules of trial and appellate procedure." *Helton v. State*, 402 N.E.2d 1263, 1266 (Ind. 1980). Box has, therefore, waived this allegation of error.

Despite the waiver, denial of the instruction was not error. We engage in a three-step analysis to determine whether instructions on lesser-included offenses should be given. *Wright v. State*, 658 N.E.2d 563, 566 (Ind. 1995). We determine: (1) whether the lesser-included offense is inherently included in the crime charged; if not, (2) whether the lesser-included offense is factually included in the crime charged; and, if either, (3) whether there is a serious evidentiary dispute whereby the jury could conclude the lesser offense was committed but not the greater offense. *Id*. at 566-567. If the "jury could conclude that the lesser offense was committed but not the greater, then it is reversible

error for a trial court not to give an instruction, when requested, on the inherently or factually included lesser offense." *Id*. at 567.

Our Indiana Supreme Court has established the standard of review for this type of case:

> For convenience we will term a finding as to the existence or absence of a substantial evidentiary dispute, a *Wright* finding. Where such a finding is made we review the trial court's rejection of a tendered instruction for an abuse of discretion. *Champlain v. State*, 681 N.E.2d 696, 700 (Ind. 1997). This finding need be no more than a statement on the record that reflects that the trial court has considered the evidence and determined that no serious evidentiary dispute exists. *See McEwen v. State*, 695 N.E.2d 79 (Ind. 1998). Its purpose is to establish that the lack of a serious evidentiary dispute and not some other reason is the basis of the trial court's rejection of the tendered instruction. However, if the trial court rejects the tendered instruction on the basis of its view of the law, as opposed to its finding that there is no serious evidentiary dispute, appellate review of the ruling is de novo. *Champlain*, 681 N.E.2d at 700.

Brown v. State, 703 N.E.2d 1010, 1019 (Ind. 1998).

Voluntary manslaughter is inherently included in murder. *O'Connor v. State*, 399 N.E.2d 364, 368 (Ind. 1980). We must accordingly determine if there was a serious evidentiary dispute whereby the jury could have concluded Box committed voluntary manslaughter but not murder. "A trial court should grant the requested Voluntary Manslaughter instruction if the evidence demonstrates a serious evidentiary dispute regarding the presence of sudden heat." *Powers v. State*, 696 N.E.2d 865, 868 (Ind. 1998). The trial judge determined the facts did not support a serious evidentiary dispute regarding sudden heat, and we thus review only for an abuse of discretion.[3] *See*

[3] Box contends the instruction was refused based on the trial court's interpretation of the law and should

Champlain, 681 N.E.2d at 700.

We find no serious evidentiary dispute regarding sudden heat. Sudden heat is "anger, rage, resentment, or terror sufficient to obscure the reason of an ordinary man; it prevents deliberation and premeditation, excludes malice, and renders a person incapable of cool reflection." *McBroom v. State*, 530 N.E.2d 725, 728 (Ind. 1988). In order "[t]o establish that a defendant acted in sudden heat, the defendant must show 'sufficient provocation to engender . . . passion.'" *Clark v. State*, 834 N.E.2d 153, 158 (Ind. Ct. App. 2005) (quoting *Johnson v. State*, 518 N.E.2d 1073, 1077 (Ind. 1988)).

To support his allegation of sudden heat, Box points to his own testimony that he was scared and felt threatened by the gun he thought Williams had on his lap and pointed toward Box. However, the record belies Box's contention he acted under sudden heat. Williams was a friendly acquaintance of Box. They lived in the same neighborhood, they had never had any problems with each other, and each had been inside the other's home on more than one occasion. Box admitted Williams never moved or raised the gun and never said anything to him. Williams did not respond when Box drew and cocked his gun. Box shot Williams six times, then calmly turned and walked away. Box testified every shot he fired hit Williams precisely where he was aiming. The facts do not suggest an ordinary person's reason would be so obscured that he was incapable of cool reflection. *See McBroom*, 530 N.E.2d at 728. Nor do they suggest Box was sufficiently

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be reviewed *de novo*. Even though the court was mistaken that voluntary manslaughter is not an inherently included offense of murder, this was not the basis for refusing the jury instruction. The court stated, "I don't think that this fact scenario as the defendant describes it is sufficient to obscure the reason of an ordinary person." (Tr. at 294.) The court arrived at a *Wright* finding by considering the evidence before the court, and we therefore review for an abuse of discretion.

provoked for sudden heat to be considered. *See Clark*, 834 N.E.2d at 158.

The trial court properly determined there was no evidentiary dispute regarding whether Box acted in sudden heat. As such, we find the court did not abuse its discretion by refusing the instruction on the lesser-included offense of voluntary manslaughter, and we affirm the trial court's ruling.

Affirmed.

KIRSCH, J., and RILEY, J., concur.